Nevertheless, Singh informed Lundy that he was "very much interested in whatever [FSD] opening [was] coming [up]." A(Id. At 48). When Lundy subsequently attempted to place Singh in an FSD position, the management of the Trinity Church buildings "refused to approve [him]...because they had negative experiences with him in the past." (Lundy Decl.¶ 7)'

On February 12, 2002, USSA issued Singh a writtenwarning accusing him of abandoning his post before he was relieved. (See Ex. 39). Singh subsequently complained through his Union ("Second Union Grievance") that USSA had issued that warning "unjustly," and that he was "being harassed by [management] on a constant basis and...denied an open Fire Safety Director's position." (Id.) (block capitalization deleted). The reference to an FSD position related to a building at 205 Hudson Street ("205 Hudson"), where USSA had appointed Garvey Austin ("Austin") as an FSD. (Singh Dep. 51-52, 57; Morales Decl.¶ 14; Singh Mot. In Opp'n to USSA's Summ.J.Mot.("Singh Aff.") at 5)

The 205 Hudson FSD job was the first FSD position at USSA that became available after Singh received his COC. (Singh Dep. 51). At the time of Austin's appointment, both he and Singh were working as security guards at 75 Varick, where Singh was serving as a BES. (Singh Dep. 52-53, 94). Although Austin received his COC three days earlier than Singh, (see Morales Decl.¶ 14; Ex.G), Singh was arguably senior to Austin because Austin was hired by USSA several years after Singh. (See Singh Dep. 63; Morales Decl.¶¶ 6, 14). Singh contends that Austin was promoted ahead of him because "Lundy was adjusting his own people."i.e., favoring Black employees. (Singh Dep. 52; see also id. At 90). USSA counters that it

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205 Hudson formerly was known as 480 Canal Street. (See Singh Dep. 30, 51).

placed Austin in the 205 Hudson FSD position ahead of Singh because" Austin had prior security experiences at 205 Hudson Street and was preferred over Singh by USSA's client." (Morales Decl.¶ 14).

On the same day that the Second Union Grievance was filed, Singh requested permission to take an unpaid leave of absence and a paid vacation which was to extend from March 1 through April 18, 2002. (Singh Dep. 60-61; Morales Decl.¶ 13). USSA granted that application, and Singh left for India on or about March 1, 2002. (Singh Dep. 60-61). Prior to his departure, Singh had a conversation with Lundy about USSA's failure to appoint him as the FSD at 205 Hudson, during which Lundy assured him that the problem would be resolved when Singh got back from his leave of absence. (See id. At 63).

Following his return to work for USSA on April 19, 2002, Singh learned that he had also been passed over for two additional FSD positions at 160/170 Varick Street ("160/170 Varick") and 225 Varick Street ("225 Varick"). (See Singh Dep. 63,66; see also Ex.L at 2). USSA appointed Brunel Alfred ("Alfred") to the 160/170 Varick position and Derek Simms ("Simms") to the 225 Varick position. (See Singh Dep. 90-91; Morales Decl.¶¶ 12,15; Exs. F (Deposition of Derick Simms, taken on Nov. 13, 2003 ("Simms Dep")), at 8, 43, I (Deposition of Brunel Alfred, taken on Nov. 13, 203 ("Alfred Dep.")), at 78, 107).

Alfred is from Haiti and considers himself to be black.(Morales Decl.¶15;Alfred Dep. 78). Alfred began working for DBK in 1997. (Morales Decl.¶ 16; Alfred Dep. 13). He received his first COC on September 7, 1999, and at some point thereafter served as an FSD. (Morales Decl. ¶ 16; Alfred Dep. 60; Ex. J). Alfred then took a three year leave of absence, returning to work at USSA on or about March 22, 2002, at which time he was assigned to a Trinity Church building at 155 Sixth Avenue. (See Morales Decl.¶ 16; Alfred Dep. 106). On March 29, 2002, Alfred was

appointed to an FSD position at 160/170 Varick. (Alfred Dep. 106; see Morales Decl.¶ 15). This appointment was made two days after Alfred received his second COC on March 27, 2002. (Ex. K).

Simms is from Jamaica and is Black. (See Simms Dep. 47). He worked as an FSD for another company from approximately 1995 through 1999. (Morales Decl.¶ 12; Simms Dep. 36). USSA hired Simms as an FSD for 435 Hudson Street ("435 Hudson") on July 25, 2001. (Simms Dep. 7). Thereafter, USSA transferred him to an FSD position at 225 Varick in mid-May 2002. (Id.;Morales Decl.¶ 12). Both 435 Hudson and 225 Varick are Trinity Church buildings.

After a hearing on October 29, 2002, the arbitrator assigned to hear the Second Union Grievance found that Singh had seniority over Austin. (See Ex. N at 2,5). In addition, the arbitrator found that Singh had superior experience because, unlike Austin, Singh was a BES at 75 Varick. (Id. At 2). The arbitrator concluded that USSA had "violated the [Union] Agreement by failing to appoint [Singh] to the [FSD] position at 205 Hudson" and directed that, within one month, i.e., by December 14, 2002, USSA "either appoint [Singh] to the [FSD] position at 205 Hudson Street or ,by agreement with the Union, to another [FSD] position in the collective bargaining unit." (Id. At 5).

Prior to this decision, Singh also filed a complaint with the State Division of Human Rights ("SDHR") on June 11, 2002. (Ex.L). In his complaint, Singh alleged that following the settlement of his first EEOC Complaint,

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USSA's papers indicate only that Simms was transferred to 225 Varick some time in 2001. (Morales Decl.¶ 12). Through a careful review of USSA's records, Singh has shown that Simms continued to sign the fire alarm log book at 435 Hudson until May 10. (See Ex. 27 at 9). He further has established that Simms signed the log book at 225 Varick for the first time on May 13, 2002. (See Singh Aff. At 23-24; Ex.29 at 9). Accordingly, the transfer took effect on May 11 or 12, 2002.

Lundy (who is Black) and Morales an his assistant (who are Hispanic) "initiated a program of harassment against [him]" through "such actions as failing to provide [him] with timely relief at [his] stations...[and] failing to timely approve [him] for sick, vacation and overtime [pay] which [he] had earned." (Id. At 1). Singh also alleged that he was kept waiting at USSA's administrative offices longer than any other USSA employee. (Id.; see also Singh Dep. 115 ("Im waiting outside [Lundy's office] for hours and hours, and all other people, they going in and out."). Singh also complained that Austin, Alfred and Simms (all of whom Singh alleges are Black) were appointed to FSD positions ahead of him. (Ex. L at 1-2). Finally, Singh alleged that, although he "maintained all the proper licenses for the position of Fire Safety Director,...[USSA] sought to impede [his] ability to retain [them] by failing to schedule him for on-site testing." (id.).

On December 27, 2002, after an investigation, the SDHR dismissed Singh's complaint on the basis that there was no probable cause. (See Compl. Attach. At 1¶4; Exs.37, 40; Singh Aff. At 35; USSA Rule 56.1 Stmt. ¶ 23; Singh Rule 56.1 Resp. to ¶ 23; Docket No.18 (USSA Resp. to Singh R. 37 Mot. Ex.C (SDHR Determination and Order After Investigation ("SDHR Det.") at 1)). In dismissing Singh's complaint, the SDHR explained that "no other [USSA] officer...received more timely shift relief or payment for leave or overtime" than Singh. (SDHR Det. At 1). The SDHR further found that Singh was treated the same as all other employees with respect to unscheduled administrative office visits. (Id.).

The SDHR found that one of the reasons Singh was not selected for the first open FSD position was "because he had not submitted his [COC] at that time." (Id.). The SDHR also noted that the successful candidate (Austin) was assigned to the building where the promotional

opportunity existed and was requested by the building superintendent. (Id.).

The SDHR further determined that Singh was not selected for the two other FSD positions about which he complained "because he did not apply and because he was on...leave." (Id.at 1-2). Finally, the SDHR determined that, contrary to Singh's assertions, "there was no impediment to his receiving on site testing." (Id.at 2).

At the time that he filed his SDHR complaint, Singh made a dual filing with the EEOC ("Second EEOC Complaint"). (See Exs.L,M; USSA Rule 56.1 Stmt. ¶ 21; Singh Rule 56.1 Stmt. At 4). On January 9, 2003, The EEOC adopted the SDHR's findings, dismissed Singh's complaint, and notified him of his right to sue. (See Ex. M).

On December 18, 2002 (four days after the arbitrator's deadline), USSA promoted Singh to an FSD position at 205 Hudson Street. (See Singh Dep.29; Morales Decl.¶ 17). Thereafter, during the first week of January 2003, Lundy informed Singh that he had arranged for Singh to take his on-site test for 205 Hudson on January 31, 2003. (See Singh Dep. 78). Singh subsequently took and passed the onsite exam at 205 Hudson on January 31, 2003, following which he was certified as an FSD on February 24, 2003. (Singh Dep. 39,69,76).

E. Singh's Termination

Following the filing of USSA's summary judgment motion, Singh became embroiled in disputes with other security personnel at 205 Hudson Street, which he maintains were not his fault. (See Singh Mot. to Amend at 4-7). Evidently fearing that he would be moved to another building, Singh placed a telephone call to Frank Lynch, the property manager at 205 Hudson, and gathered signatures on a petition commending him for a "job well done." (Id. At 7 & Attach. (USSA Disciplinary Action Report dated Apr. 21, 2004)). - USSA maintains that these actions violated a company policy prohibiting indicates direct

contact between USSA 's employees and its clients.(id). The USSA paperwork indicates that Singh was merely "suspended for 5 work day[s]" but cautions that he would be terminated if he "called the client directly" or "start[ed] any more petitions." (Id.). Notwithstanding this notation, Singh contends, and USSA does not dispute, that he actually was terminated on April 21, 2004. Singh contends that his termination was part of USSA's retaliation for the filing of his First EEOC Complaint. (Singh Mot. to Amend at 8).

Singh contends that USSA's discriminatory conduct has frustrated him and caused him to have ongoing nightmares resulting in headaches. (Singh Dep. 112-113). He also alleges that he twice has had heart pains that felt "almost like a dying situation" between the time that Austin was appointed an FSD and when he was promoted. (Id. At 108-09, 111). However, Singh has not sought any medical attention or psychological help in connection with these problems. (Id. At 109-10, 113-114).

III. Procedural History

A. Singh's Complaint

Singh filed his complaint on March 24, 2003. (Docket No.1). He alleges in his complaint that USSA discriminated against him on the basis of is race ("Asian Indian"), national origin ("Indian"), and color ("Wheatish"), by failing to promote him, denying him equal terms and conditions of employment, and retaliating against him for filing his First EEOC complaint. (Compl. At 1¶¶ 4,7). At his deposition, Singh alleged further that Lundy and USSA harassed him and subjected him to a hostile work environment from the time he filed his First EEOC Complaint through at least the date of his deposition. (See Singh Dep. 112-113,116-17,120-21,124,127; Singh Aff. At 40).

B. Motion to Amend

On May 11, 2004, Singh moved to amend his complaint to add three new Title VII claims. (See Mot. to Amend . at1). First, Singh seeks to allege that USSA and John Mihnovich, Jr. ("Mihnovich"), who replaced Morales as USSA's New York City Branch manager, terminated him as a part of an unlawful "conspiracy [and in] retaliation [for his] previous complaints and [his] ongoing [l]awsuit" in federal court. (Id. At 9). Singh further seeks to allege that USSA conspired with the Union and eight USSA employees, including Austin and Minhnovich, to discriminate against him by attempting to oust him from 205 Hudson on week before his termination. (See id. At 2-3). Singh also contends that Garvey, with the support of "other Blacks working for the maintenance co[mpany,]...which also has a contract with Trinity [R]eal Estate [at] 205 Hudson," engaged in acts of Harassment Against him. (Id. At 4).

On the basis of these proposed new claims, Singh seeks to increase the amount he is seeking for emotional distress and punitive damages from $4 million to $30 million. (Id. At 1).

III. Discussion

The first five pages of Singh's complaint use the standard employment discrimination form that this Court's Pro Se Office makes available to plaintiffs. On that form, Singh indicated that he is bringing his claims under Title VII. USSA construes the complaint as also asserting claims of employment discrimination under the State Human Rights Law, N.Y. Exec. L§ 290, et seq. ( See USSA Mem. Of L. at 1). I see no indication in the complaint that Singh is seeking to assert such claims. In any event, even if Singh did seek to invoke the Human Right Law, the analysis of his claims, and therefore the result, would be the same as under Title VII. See, e.g., Sowemimo v.D.A.O.R. Sec., Inc., 43 F. Supp.2d 477, 484 (S.D.N.Y. 1999)(claims under Title VII and the Human Rights Law "can be examined identically for summary judgment purposes"); Rosenblatt v. Bivona & Cohen, P.C., 946 F. Supp. 298, 300 (S.D.N.Y. 1996) ("New York State Human Rights Law is applied in a fashion consistent with the federal civil rights laws.").

A. Summary Judgment

1. Standard of Review

Under Federal Rule of Civil Procedure 56(c), summary judgment is appropriate only when

> The pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavit, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In deciding a motion for summary judgment, the court must "view the evidence in the light most favorable to the party against whom summary judgment is sought and...draw all permissible inferences in favor of that party." Fischi v. Armitage, 128 F. 3d 50, 55 (2d Cir. 1997). The court also must accept as true the non moving party's evidence, if supported by affidavits or other evidentiary material. See Kulak v. City of New York, 88 F. 3d 63, 70 (2d Cir. 1996). Assessments of credibility, choosing between conflicting versions of the events, and the weighing of evidence are matters for the jury, not for the court. Fischl, 128 F.3d at 55. See also Fed. R. Civ.P 56(e) 1963 advisory committee's note. Thus, "[t]he court's function is not to resolve disputed issues of fact but only to determine where there is a genuine issue of material fact to be tried." Fischl, 128 F.3d at 55.

To defeat a motion for summary judgment, the non-moving party cannot merely rely upon allegations contained in the pleadings that raise no more than "some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Rather, the nonmoving party must offer "concrete evidence from which a reasonable juror could return a verdict in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S.242,256(1986).

The Second Circuit has cautioned that summary judgment is often inappropriate in cases where the trier of will have to delve into an employer's intent, because intent

is an issue as to which direct evidence is rarely available. See, e.g., Gallo v. Prudential Residential Servs. Ltd. P'ship, 22 F.3d 1219, 1224 (2d Cir. 1994); Patrick v. LeFevre, 745 F.2d 153, 159 (2d Cir. 1984). However, when an employer has explained its conduct and the plaintiff has offered only conclusory assertions in opposition, summary judgment may be granted. See, e.g., Meiri v. Dacon, 759 F.2d 989, 998 (2d Cir. 1985)("To allow a party to defeat a motion for summary judgment by offering purely conclusory allegations of discrimination, absent any concrete particulars, would necessitate a trial in all [discrimination] cases.").

2. Delayed Promotion

Singh alleges that USSA's decision to place Austin, Alfred, and Simms in FSD jobs ahead of him was racially motivated. (Compl.¶¶ 4, 7; Singh Dep. 90-91, 98; Singh Aff. At 4). To make out a prima facie failure-to-promote claim, a plaintiff must show that. (a) he is a member of a protected class; (b) he applied for a position for which he was qualified; (c) he was rejected for the position; and (d) the circumstances give rise to an inference that there was a discriminatory motive. Howley v. Town of Stratford t, 217 F.3d 141, 150 (2d Cir.2000); Brown v. Coach Stores, Inc., 163 F.3d 706, 709 (2d Cir 1998)(Citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)); Stern v. Trustees of Columbia Univ., 131 F. 3d 305, 311-12 (2d Cir. 1997).

If the plaintiff succeeds in making this "de minimis" showing, see Howley, 217 F.3d at 150 (quoting Chambers v. TRM Copy Ctrs. Corp., 43 F.3d 29, 37 (2d. Cir. 1994)), the burden shifts to the defendant to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." McDonnell Douglas, 411 U.S. at 802. If the defendant satisfies that burden of production, the plaintiff then must prove that the legitimate reasons

offered by the defendant are not true, but, rather, a pretext for discrimination. Id. At 804

Singh is unquestionably a member of a protected class. See Rikhy v. AMC Computer Corp., No. 01 Civ.7007 (WHP), 2003 WL 1618529, at *3 (S.D.N.Y Mar. 28, 2003). Concluding that an Indian plaintiff meets this requirement).Moreover after Singh received his COC he told Lundy that he wanted to fill the next open FSD position. (Singh Dep. 42-43, 46-48;Ex.38.) Singh therefore applied for an FSD job at a time when he was qualified for the position. See Brown,163F.3d at 710(Plaintiff must make "some specific effort to apply for a particular position"). Singh arguably was rejected for at least Three FSD jobs that became available after he expressed interest in becoming an FSD. Finally The circumstances warrant an inference of discrimination because all three FSD positions were filled by USSA employees who Singh maintains are Black. See Green v. Harris Publ'ns Inc., 331 F. Supp.2d 180, 187 (S.D.N.Y. 2004)("An inference of discrimination may arise if the position remains open and the employer continues to seek applicants of the plaintiff's qualifications [] or if the position was filled by someone not a member of plaintiff's protected class.") ( quoting Gomez v. Pellicone, 986 F.Supp. 220, 228 (S.D.N.Y. 1997)); Velez v. Project Renewal, No. 02 Civ.3084 (AKH), 2003 WL 402500, at *3 (S.D.N.Y. Feb 20, 2003)("courts have found an inference of discriminatory intent where employees not in plaintiff's protected group are treated more favorably."). Singh therefore has made the minimal showing necessary to establish his prima facie failure-to-promote claim.

USSA contends that this case does not involve a failure to promote, but, rather to grant Singh a timely promotion. (See USSA Mem. Of L. at 8). In Jacob-Mua v. Veneman, 289 F. 3d 517 (8th Cir. 2002), upon which USSA relies, the Eight Circuit stated that the "deni[al of] of a timely promotion...[did not] rise to the level of an adverse employment action." Id. At 522. However, that observation appears to have turned on the facts of the case, which suggested that the plaintiff's "grade and pay increase during her employment, she was allowed to work at the Federal Building upon her request, she was given permission to hire an intern to assist her with data entry and she was granted three months unpaid leave."Id.Here,at a minimum, Singh received less pay until he was promoted. As shown below, however, there is no need to resolve

whether this constituted a material disadvantage because USSA would be entitled to summary judgment even if Singh made a prima facie showing that he suffered an adverse employment action because his promotion was delayed.

At the next stage of the inquiry, USSA must set forth legitimate, nondiscriminatory reasons for its decisions to place Austin, Alfred and Simms in FSD positions before promoting Singh. USSA contends that it promoted Austin to the 205 Hudson FSD position instead of Singh because Austin had worked as a security guard previously at that location and was preferred by building management. (See Morales Decl.¶ 14). USSA further contends that it promoted Alfred ahead of Singh because Singh was in India on leave when the 160/170 Varick FSD position became available. (Id. ¶15). According to Morales, that position had to be filled immediately to avoid receiving a summons from the FDNY. (See id.). Finally, USSA contends that Singh did not have is COC when USSA hired Simms as an FSD for 435 Hudson in July 2001. (Id.¶ 12). Although he appears to have been transferred to 225 Varick after Singh returned from his vacation, Simms had many more years of experience as an FSD, a factor that the Union Agreement expressly allowed USSA to consider in determining whether Singh should have been promoted to the vacancy at that building. USSA has therefore met its limited burden of production in this case.

Under the familiar McDonnell Douglas framework, the burden of persuasion therefore rests with Singh, who must adduce evidence that the reasons proffered by USSA for its decisions are pretextual. See Back v. Hastings, 365 F.3d 107, 124 (2d Cir. 2004). Singh has failed to do so. Although Singh claims that he had more experience than Austin because he was a BES at 75 Varick (and the Arbitration Award supports this notion), Singh has not proffered any evidence to contradict USSA's claim that it

promoted Austin to the 205 Hudson position because Austin had previously worked at that building and was preferred by the building management. At best, Singh's argument appears to be that USSA's failure to honor his seniority is some evidence of discriminatory intent. However, the Union Agreement expressly provides that seniority is not the dispositive factor in deciding who should be promoted from within. Moreover, even if Singh were able to show that the wishes of building management should not have been considered, the mere violation of a collective bargaining agreement does not give rise to an inference of discrimination in violation of Title VII.. Indeed, as Singh necessarily concedes, USSA eventually did promote Singh to an FSD position, which belies his claim that USSA made it a practice to favor Black employees. See Bickerstaff v. Vassar College, 196 F/ 3d 435, 452 (2d Cir. 1999)("Statements that are devoid of any specifics, but replete with conclusions, are insufficient to defeat a properly supported motion for summary judgment.")

Turning to Alfred, USSA has shown that he was hired as an FSD on March 22 and transferred to 225 Varick on March 29, 2002, while Singh was on vacation. (Morales Decl.¶ 16; see Ex. 12 at 11). Since Alfred was hired during a period that Singh was unavailable to work, there is no reason to believe that the decision to assign Alfred to the vacant FSD position there was discriminatory.

In a futile effort to show that Alfred was placed in an in an FSD job after Singh returned to work, Singh notes that he requested the building log books for 160/170 Varick Street during pretrial discovery. Because the record book entries for January 1 through 6 and January 18 through April 24, 2002, are missing, Singh speculates that Alfred actually began to work at 160/170 Varick on April 25, 2002, when his first entry appears on the log books produced for that building. (See Singh Aff. At 7 ("Entries

for that period must have [been] made by other individuals and for that reason the said missing period not presented to me for inspection.")). Suffice it to say, there is no evidence-apart from speculation-that the log books for March would not have reflected entries made by Alfred had they been available to be produced. There also is no evidence of spoliation. As a consequence, there is no reason to believe that Alfred was improperly appointed to an FSD position after Singh returned from India on April 19, 2002.

Finally, Singh has not adduced any evidence to counter USSA's assertion that it hired Simms to work as an FSD at 435 Hudson in July 2001, more than six months before Singh received his COC. Thereafter, he evidently was transferred to 225 Varick on May 11, 2002, which was after Singh's return to his job. (See supra n.6). Even if Simms's transfer were deemed a promotion, the Union Agreement provides that "preference shall be given to those employees already on the job, based upon the employee's seniority,[and that] training, ability and appearance, shall also be considered." (Agreement, ART. XIV, CI. 8). The decision to place Simms at 225 Varick was consistent with this language since Simms was already working as an FSD and had four years of FSD experience. In these circumstances, the mere fact that Simms was promoted ahead of Singh does not warrant any inference that the decision was based on any improper consideration. USSA consequently is entitled to summary judgment with respect to Singh's claim that he was denied a timely promotion.

3. Hostile Work Environment

Under Title VII, an employer may not "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(a)(1). An employee may suffer such discriminatory treatment when he is required to work in a hostile or abusive environment. Gregory v. Daly,

243 F.3d 687, 691 (2d Cir. 2001) (quoting Harris v. Forklift sys., Inc., 510 U.S. 17,21 (1993)). To sustain a Title VII claim on this theory, however, Singh must prove (1) that his working environment was "objectively hostile" and (2) that a specific basis exists for imputing the harassing conduct to USSA. See Howley, 217 F. 3d at 153-54; O'Dell v. Trans World Entm't Corp., 153 F.Supp.2d 378, 385 (S.D.N.Y. 2001)(Scheindlin, J.).

To determine whether a work environment is "objectively hostile," a court must examine all of the circumstances, including the "frequency of the discriminatory conduct; its severity; whether it unreasonably interferes with an employee's work performance." Harris, 510 U.S. at 23. "[H]arassment is actionable under Title VII only if it is so severe or persuasive as to alter the conditions of [the victim's] employment and create an abusive working environment." Clark County Sch. Dist. V. Breedon, 532 U.S. 268, 270 (2001) (quoting Faragher v. Boca Raton, 524 U.S. 775, 786 (1998))(second brackets in original; internal quotations marks deleted). Isolated incidents of harassment, unless "extremely seriously," are not sufficient to create a hostile work environment. See Breedon, 532 U.S. at 271; Howley, 217 F.3d at 153; O'Dell, 153 F.Supp.2d at 386. See also Perry v. Ethan Allen, Inc., 115 F.3d 143, 149 (2d Cir. 1997) (incidents of harassment must be "more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive").

Singh Alleges that USSA harassed him from the date

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The SDHR found that"[n]o other [USSA] officer or employee... received more timely...payment for leave or overtime [than Singh]." (SDHR Determination).

The SDHR found that "[n]o other [USSA] officer or employee... received more timely shift relief [than Singh]." (id.).

that he filed his First EEOC Complaint by (1) promising him an FSD job, but giving the available positions to less qualified employees (Singh Dep. 114-15);(2) requiring him to wait for hours outside of Lundy's office on several occasions while allowing other inside to meet with Lundy (id. At 115);(3) not paying him vacation time (although he acknowledges that USSA paid a monetary penalty as a result of an arbitration regarding this issue)(id. At 115-16);(4) not paying him overtime (id at 116);(5) occasionally not making timely payments for sick leave and vacation time(id.); (6) failing to give him his paychecks on time (id. At 124); (7) paying him the wrong
wage (Singh Aff. At 40); (8) not providing a person to relieve him at the end of his tour (Singh Dep. 118); and (9) fraudulently writing him up on two occasions for abandoning his post so that USSA had "something against [him] in the file so they [did not have to] offer him th[e] [FSD] job." (Id. At 117, 121).

'Title VII is intended to ameliorate unlawful discrimination in the workplace; it is not guarantee of a pleasant or problem-free environment. See Figueroa v. City of New York, No. 00 Civ. 7559 (SAS), 2002 WL 31163880, at *3(S.D.N.Y. Sept. 27, 2002)("if the workplace is unsavory for any reason other than hostility

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At his deposition, Singh testified that USSA also threatened to bring charges against him if he cashed several paychecks which were made out in amounts greater than Singh believed he actually had earned. (See Singh Dep. 124-27). In the errata sheets that he submitted with his signed deposition, Singh contended that this three-page discussion was "wrongfully added and described," but gave no indication to what allegedly was actually said in its stead. (E.24). Although his "correction" to the deposition stretches credulity, the errata sheet also suggests that he is no longer arguing that he alleged overpayments and USSA's reaction thereto were a form of harassment.

generated on the basis of race, gender, ethnicity, or religion, no federal claim is implicated.")(quoting Vore v. Indiana Bell Tel. Co., 32 F.3d 1161, 1162 (7th Cir. 1994)); Caldwell v. Servicemaster Corp., 996 F.Supp. 33, 50 (D.D.C. 1997) ("Title VII only prohibits discrimination; it does not guarantee employees a pleasant work environment."). Although Singh has managed to cobble together a list of perceived injustices, he has not shown that any of the conditions to which he was subjected resulted from discriminatory animus or that other employees were treated any better. For example, when he was asked whether any other employees also received incorrect paychecks, Singh responded, "it's unknown to me." But went on to observe, "this is happening frequently." (Singh Dep 116). Obviously, an imposition on all of USSA's employees cannot give rise to a Title VII violation simply because Singh is one of the individuals affected.

More importantly, even if Singh were correct in his supposition that he was subjected to the litany of acts set forth in his papers because he is Indian (or"Wheatish"), it is clear that the misconduct occurred sporadically over the course of his years of employment by USSA. This is insufficient to establish a hostile work environment claim. See Quinn v. Green Tree Credit Corp., 159 F.3d 759, 768 (2d Cir. 1998)("occasional episodes of harassment will not merit relief under Title VII; in order to be actionable, the incidents of harassment must occur in concert or with a regularity that can reasonably be termed pervasive")(quoting Tomka v. Seiler Corp., 66 F. 3d 1295, 1305 n.5 (2d Cir. 1995)).

USSA is therefore entitled to summary judgment on Singh's claim that USSA subjected him to a hostile work environment on tbasis of his race, national origin, or color.

4. Unequal Terms and Conditions Of Employment

Singh also contends that USSA subjected him to "unequal terms and conditions of employment." (compl.¶ 4). To the extent that this claim does not overlap with his hostile work environment claim, it appears to arise out this belief that he should have been paid the allegedly higher salary of a BES while he was working at 75 Varick. (Singh Dep. 53). He also alleges that USSA's managers did not acknowledge that he and others were working in the capacity of a BES because "they're saving money [and]...don't want to pay to the guards." (id.) Because USSA guards working as BESs obviously do not constitute a protected class under Title VII, even if Singh were able to show that he and other USSA employees who were assigned BES duties were underpaid, this form of occupational discrimination would not give rise to a Title VII claim. Furthermore, Singh has not introduced any admissible evidence establishing that BES employees were, in fact, entitled to a higher salary than other guards. At his deposition, Singh testified that he was told by a "reliable source" that a BES was entitled to an additional one dollar per hour. (Singh Dep. 102). Singh identified the reliable source as "Fred Neer," a loading dock employee. According to Singh, Neer told him that absence of any showing that Neer was a USSA manager, his statements, even if accurately reported by Singh, are clearly inadmissible hearsay. See Fed. R. Evid. 801,802). USSA is therefore entitled to summary judgment on..

.USSA states that the individual identified by Singh as "Neer" is actually Fedner Jecrois, a USSA employee of Haitian descent. (Morales Decl. ¶ 20). According to USSA, neither Jecrois nor any other USSA security officer received a pay increment for serving as a BES. (id.)

Singh's unequal terms and conditions of employment claim.

5. Retaliation

Singh also claims that USSA retaliated against him for filing the first EEOC complaint. (See Compl. ¶ 4). Under Title VII, it is illegal for an employer to retaliate against an employee who has exercised his statutory right to complain about conduct that he considers discriminatory. See Cifra v. Gen. Elec. Co., 252 F.3d 205, 216 (2d Cir. 1986) ("A finding of unlawful retaliation is not dependent on the merits of the underlying discrimination complaint.").

To make out a prima facie case of retaliation, Singh must show that (1) he participated in a protected activity,(2) USSA knew of this activity, (3) he was subjected to an adverse employment action, and (4) there is a casual connection between the protected activity and the adverse employment action. See Cifra, 252 F. 3d at 216; Holt v. KMI-Continental, Inc., 95 F. 3d 123, 130 (2d Cir. 1996). The last of these required elements can be established: (a) "directly through evidence of retaliatory animus directed against a plaintiff by the defendant;" or (b) "indirectly by showing that the protected activity was followed closely by discriminatory treatment, or through other evidences such as disparate treatment of fellow employees who engaged in similar conduct." DeCintio V. Westchester County Med. Ctr., 821 F. 2d 111, 115 (2d Cir. 1987) (internal citations omitted; emphasis in original).

Despite his submission of extensive papers in opposition to USSA's summary judgment motion, Singh has not pointed to any direct evidence that any of USSA's actions were undertaken because of retaliatory animus. Moreover, the only conduct alleged in the complain which could conceivably rise to the level of an adverse employment action is USSA's alleged failure to appoint Singh to an FSD position on the schedule that he believes was reasonable. Singh, of course, could not be considered for such a position

until he had passed the written test and secured his COC, which did not occur until more than one year after his First EEOC Complaint was fully resolved in January 2001. This lengthy gap between Singh's protected filing of the First EEOC Complaint and the allegedly retaliatory conduct precludes any inference that the two events were casually related. See, e.g., Hollander v. American Cyanamid Co., 895 F.2d 80, 85-86 (2d Cir. 1990)(Finding three month gap too long to "fulfill the final requirement of a casual nexus" between the protected activity and retaliatory action); Gilford v. City of New York, No 03 Civ. 0091 (SHS), 2004 WL 1574695, at *7 (S.D.N.Y. 2002) ("Claims of retaliation are routinely dismissed when as few as three months elapse between the protected activity and the allegedly act of retaliation."). Singh's retaliation claim, therefore, also fails to withstand scrutiny.

6. Emotional Distress

Singh's complaint can also be liberally construed as asserting a state law claim for intentional infliction of emotional distress. (See Compl.¶ 8). In that regard, Singh testified at his deposition that he twice suffered serious "heart pain" and has had constant nightmares and headaches as a result of USSA's actions. (See Singh Dep. 108, 111-13). Singh also claimed that he is "living in fear" that USSA will press charges against him for having stolen the money that he allegedly was overpaid. (id. At 127-28). He also contends that the appointment of others to FSD positions that he felt should have been given to him resulted in his "happiness [being taken] away." (E.22).

Under New York law, to prevail on a intentional infliction of emotional distress claim, a plaintiff must prove four elements: (1) extreme and outrageous conduct; (2) an intent to cause, or reckless disregard of, a substantial probability of causing severe emotional distress; (3) a causal link between the conduct and the injury; and (4) severe

emotional distress. Bender v. City of New York, 78 F. 3d 787, 790 (2d Cir. 1996); O'Bradovich v. Village of Tuckahoe, No. 04 Civ. 0049 (CM), 2004 WL 1616588, at *18 (S.D.N.Y.Jul. 19, 2004) (citing Stuto v. Fleishman, 164 F. 3d 820, 827 (2d Cir. 1999)); Holwell v. New York Post Co., 81 N.Y.2d 115, 122 (1993). This is a difficult showing to make. Indeed, as the New York Court of Appeals noted in Holwell, every intentional infliction of emotional distress claim to have come before that court failed "because the alleged conduct was not sufficiently outrageous." Holwell, 81 N.Y.2d at 122. To prevail on this aspect of his claim, Singh must show that the conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized [society]." Bender, 78 F.3d at 791-92 (brackets in original) (quoting Murphy v. Am. Home Prods., 58 N.Y.2d 293, 303 (1983)(quoting Restatement of Torts(Second) § 46 cmt. D (1965)).

Whether conduct rises to the requisite level of venality is a question of law. Thomas v. Bergdorg Goodman, Inc., No. 03 Civ. 3066 (SAS), 2004 WL 2979960, at *7 (S.D.N.Y. Dec. 22, 2004)(citing Holwell, 81 N.Y. 2d at 122). Here, Singh's complaints involve nothing more than a garden-variety dispute between an employer and an employee. Although the eventual loss of Singh's job may have had a crushing impact on him and his family, USSA's actions are not so repugnant to society as to support a separate intentional infliction of emotional distress claim.

Of equal importance, even if Singh were able to show that USSA's conduct was truly outrageous, to prevail on this state law claim, he would also have to establish through medical evidences that he suffered severe emotional distress. Bujnicki v. American Paving and Excavating, Inc, No. 99 CV 646S, 2004 WL 1071674, at

*14 (W.D.N.Y., Mar 30, 2004); Pepe v. Malansky, 67 F. Supp. 2d 186, 187 n.1 (S.D.N.Y. 1999); Walentas v. Johnes, 683 N.Y.S.2d 56, 58 (1st Dep't 1999). Singh has not submitted any medical evidence as part of his opposition papers. In fact, he admits that he has never seen a doctor in connection with the various ailments that he attributes to USSA's alleged misconduct. (Singh Dep. 108-14).

For these reasons, USSA is entitled to summary judgment with respect to any intentional infliction of emotional distress claim that Singh may assert.

B. Motion to Amend

Rule 15(a) of the Federal Rules of Civil Procedure Provides that a party may amend its complaint after a responsive pleading has been served only by leave of the court. Whether to grant a motion to amend is a matter that lies within the sound discretion of the district court. See Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 178, 182 (1962). "Perhaps [] the most important factor to be taken to consideration is whether the opposing party will be unduly prejudiced if the proposed amendments is permitted." Marine Midland Bank v. Keplinger & Assocs., 94 F.R.D. 101, 103 (S.D.N.Y. 1982).

Singh has moved to amend his complaint to add several claims against USSA (and possibly Mihnovich and others) arising out of the disputes at 205 Hudson that led to his termination. Prior to filing suit on a Title VII claim, a plaintiff must present his allegations to the EEOC. 42 U.S.C. § 20003-5 (f)(1); Brown, 163 F. 3d at 712. This requirement of administrative exhaustion is intended to "encourag[e]...settlement of employment discrimination claims" through "[c]ooperation and voluntary compliance," Bushey v. New York State Civ. Serv. Comm'n, 733 F.2d 220, 226 (2d Cir. 1984) (Second brackets in original), by giving the "administrative agency the opportunity to

investigate, mediate and take remedial action." Brown, 163 F. 3d at 712.

In this case, there is no indication that Singh brought an administrative complaint alleging that USSA violated Title VII through his termination or any of the events in April 2004 related thereto. Accordingly, to prosecute a Title II claim in connection with these more recent events, Singh must show that they are "reasonably related" to the Second EEOC Complaint that he filed in 2002. See Butts v. City of New York Dep't of Hous. Pres. And Dev., 990 F.2d 1397, 1401 (2d Cir. 1993), rev'd on other grounds, 173 F.3d 843 (2d Cir. 1999)

There are only three situations in which courts have held that claims not explicitly alleged in an EEOC charge are reasonably related thereto. Id. At 1420. The first arises when the claim was "loosely pleaded" in the EEOC charge and "the conduct complained of would fall within the 'scope of the EEOC investigation which can reasonably be expected to grow out of the charges of discrimination.'" Id. (quoting Smith v. American President Lines, Ltd., 571 F.2d 102, 107 n.10 (2d Cir. 1978)). The second exception applies to cases in which the plaintiff alleges further retaliatory discrimination resulting from the filing of an EEOC charge. Id. The third exception applies in situations in which "a plaintiff alleges further incidents of discrimination carried out in precisely the same manner alleged in the EEOC ccharge." Id. At 1402-03.

Singh cannot invoke the first of these exceptions because the additional events that Singh proposes to add to underlie his complaint occurred nearly two years after he filed his Second EEOC Complaint. Although the parties have not furnished the Court with a copy of Singh's Second EEOC Complaint, his complaint to the SDHR (which was filed the same day and is presumably substantially the same) alleges that he was harassed by USSA supervisors in response to his filing of the First EEOC Complaint in 2000.

Singh also complained that he had been denied an FSD position at "480 Hudson" and, therefore, the opportunity to take an onsite test. There is no reason to believe that an investigation into these events would encompass his termination in 2004.

There is also has been no showing that the events of April 2004, which led to Singh's termination, are causally connected to the filing of either his First or his Second EEOC Complaint. Moreover, the period of nearly two years that elapsed between the filing of his Second EEOC Complaint and his termination is too long to permit the inference that such a causal link exists. For these reasons, the second exception to the requirement of administrative exhaustion is also unavailable to Singh.

Furthermore, the events of 2004 did not involve any conduct on the part of USSA which was carried out in the same manner as that giving rise to his second EEOC Compliant. Indeed, with the exception of Austin, all of the dramatis personae that Singh accuses of wrongdoing in 2004 differ from the USSA officers and employees whose conduct Singh challenged in 2002.

Turning to Austin, Singh alleges that Austin made false accusations about Singh which, together with other false accusations, led to Singh's dismissal. By comparison, in the Second EEOC Complaint, Austin was alleged to have been one of the beneficiaries of USSA's discriminatory acts, not a malefactor in his own right. Although the Second EEOC Complaint accused USSA of harassment, there was not so much as a syllable suggesting that USSA or its officers or employees had made false accusations in an effort to imperil Singh's employment, which is the crux of the new claims he now seeks to pursue. Singh therefore cannot invoke the third Butts

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This appears to be a typographical error. Singh evidently was referring to 205 Hudson, which previously was known as 480 Canal Street.

exception to the requirement of administrative exhaustion.

It also bears mention that, if the Court were to permit an amendment at this late stage, discovery would have to be reopened. Although Singh urges the Court to grant the motion without reopening discovery, (See Singh Resp. to USSA Mem. Of L. In Opp'n to Request to Amend Compl. At 6), USSA obviously would be entitled to explore the bona fides of Singh's new claims, which were not part of this case when the prior discovery was underway. USSA therefore would be subjected to additional delay and expense, and it might have to file a second summary judgment motion. As the Second Circuit has noted, and amendment of the complaint in such circumstances is "especially prejudicial." Ansam Assocs., Inc v. Cola Petroleum, Ltd., 760 F.2d 442, 446 (2d Cir. 1985).

The final blow to Singh's proposed amendments is the fact that it would be futile because he can no longer administratively exhaust his new claims. Under Title VII, an administrative complaint must be brought within 300 days after the allegedly illegal conduct. See 42 U.S.C. § 2000e-5(e)(1). Here, Singh's termination and the retaliation allegedly leading up to it follows a lengthy period in which Singh was apparently functioning successfully as an FSD. His termination in April 2004 therefore cannot be characterized as part of a course of continuing discrimination or retaliation, nor can it be deemed to relate back to the conduct giving rise to his First EEOC Complaint. See Nat'l R.R. passenger Corp. v. Morgan, 536 U.S. 101, 112-14 (2002) (discrete acts, such as failure to promote, "that fall within the statutory time period do not make timely acts that fall outside the time period); see also Diaz v. Weill Med. Ctr. Of Cornell Univ., No. 02 Civ. 7380 (AJP), 2004 WL 285947, at *18 (S.D.N.Y. Feb. 13, 2004) (quoting Hernandez v. Kellywood Co., No. 99 Civ.

10015 (LTS) (KNF), 2003 WL 22309326, at **14**-15 (S.D.N.Y. Oct. 8, 2003)) ("it is clear from Morgan and the relevant Second Circuit case law that the allegedly unwarranted negative evaluations, the pay disparities, the fact that Plaintiff was asked to do work allegedly outside her job description, and the allegedly retaliatory discharge are to be considered discrete acts, and therefore, cannot be lumped together to form a 'continuing violation' so as to permit Plaintiff to bring all her claims despite the fact that a number of them arise from events occurring, or actions taken outside the applicable statue of limitations period.").

As a consequence, to bring an action based on his termination, Singh would first have to exhaust his administrative remedies. There is no evidence that Singh has done so. Moreover, any attempt to do so now would be time barred since more than 300 days have elapsed. It follows that the amendments that Singh proposed plainly would be futile. Singh's motion to amend his complaint is therefore denied.

Conclusion

For the foregoing reasons, Singh's motion to amend his complaint is denied, USSA's motion for summary judgment is granted, and the Clerk of the Court is requested to close this Case.

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SO ORDERED x _____

Dated: New York, New York FRANK MAAS
January 31, 2005 United States Magistrate Judge

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No. 05-1223

IN THE

# Supreme Court of the United States

HARINDER JEET SINGH,

*Petitioner*,

*v.*

U.S. SECURITY ASSOCIATES, INC.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Did the Second Circuit Court of Appeals correctly affirm the district court's summary judgment in favor of Respondent, Petitioner's employer, where the *pro se* Petitioner failed to present sufficient evidence in support of his claims of employment discrimination?

## PARTIES TO THE PROCEEDING

Petitioner is Harinder Jeet Singh, an individual appearing *pro se*. Respondent is U.S. Security Associates, Inc., a Delaware corporation which by contract provides private security services to its customers. Respondent is 100% owned by U.S. Security Holdings, Inc., a Delaware corporation, which in turn is 100% owned by U.S. Security Associates Holdings, Inc.

## BASIS FOR JURISDICTION

The Second Circuit Court of Appeals entered its Summary Order in this matter on October 14, 2005. While Petitioner does not so state, presumably he seeks to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

## INTRODUCTION

Petitioner, a *pro se* plaintiff of Asian Indian origin, claims he is a victim of employment discrimination but has consistently failed to present any competent evidence in support of his claim. Instead he has offered only conclusory averments and unsupported charges of a vast conspiracy involving several members of Respondent's diverse workforce (including African Americans and Hispanics whom he claims are favored over him); Respondent's attorneys; Petitioner's union; the court reporter who took his deposition; officials of various state and federal administrative bodies who found that his charges lacked merit; and the courts below. The agencies and courts properly dismissed his claims, which are highly fact-specific and unsuitable for this Court's review.

## OPINIONS OF THE COURTS BELOW

The copies of the relevant opinions of the lower courts which Petitioner attaches to his Petition appear to be retyped versions of those opinions. For the Court's reference, reliable versions of those opinions may be found as follows: The opinion of Magistrate Judge Maas for the United States District Court, Southern District of New York, entered February 1, 2005, Case No. 03 Civ. 2059FM, denying Petitioner's motion to amend his complaint and granting

Respondent's motion for summary judgment, is found at 66 Fed. R. Evid. 439 and 2005 WL 236511. The Summary Order of the United States Court of Appeals for the Second Circuit, affirming the district court's judgment, entered October 14, 2005, Docket No. 05-1347-CV, is found at 152 Fed. Appx. 36 and 2005 WL 2596882. The district court properly granted summary judgment in favor of the Respondent and the court of appeals correctly affirmed that decision.

By way of explanation, references in the Petition to Petitioner's termination of employment notwithstanding, the decisions which Petitioner asks this Court to review concern only his claims that Respondent failed to promote him in a timely manner — it being undisputed that Respondent did promote him — along with equally unsupported assertions that Respondent subjected him to unequal terms and conditions of employment and a hostile work environment; retaliated against him for filing a complaint with the Equal Employment Opportunity Commission (EEOC); and intentionally inflicted emotional distress upon him. He filed a second lawsuit after his employment with Respondent ended, the result not of a termination by Respondent but of his voluntary abandonment of his job. In that lawsuit, which remains pending in the district court as of this writing, Respondent has filed another summary judgment motion.

## RESPONSE TO PETITIONER'S QUESTION(S) PRESENTED

Petitioner purports to present a total of 17 "Question(s) [sic] Presented," though in fact his "questions" are not issue statements, but instead consist of additional statements of unsupported facts and unwarranted conclusions. Rather than attempt to interpret and respond to each "question" individually, Petitioner merely states for the record that none of Petitioner's

allegations of wrongful conduct have any support in the record, and the courts below have fully addressed all of them. Respondent respectfully relies on the lower courts' opinions in this regard.

Contrary to Petitioner, no evidence was "missed and overlooked" or "completely ignored" by the courts below. As the courts found, Petitioner presented no competent or admissible evidence in support of his claims. The record contains no evidence of "lies," "falsifications," "fraud," "conspiracy," "cover up," "discrimination," or any other improper actions by the agencies, courts, attorneys, or by Respondent or Respondent's employees. Nor did he present evidence sufficient to support an emotional distress claim. The Magistrate Judge explained all these findings in detail in his well-reasoned opinion at 66 Fed. R. Evid. 439, 2005 WL 236511.

## RESPONSE TO PETITIONER'S STATEMENT OF THE CASE

Petitioner's Statement of the Case does little more than repeat the assertions contained in his Questions(s) Presented. In addition to his earlier averments, Petitioner declares that Respondent violated the terms of an EEOC settlement agreement. Again for the record, there is no basis in the record for this claim, and it is simply untrue.[1] Again, Petitioner's reference to his "forcible termination," aside from being factually inaccurate, concerns an issue which is not before the Court in this action.

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1. At one point during Petitioner's employment, Respondent inadvertently made a minor clerical error which resulted in Respondent owing Petitioner for approximately two-and-one-days' pay. When the error was brought to Respondent's attention, Respondent promptly corrected it and paid Petitioner what it owed him.

## RESPONSE TO PETITIONER'S REASONS FOR GRANTING THE PETITION

Petitioner asserts no compelling reasons for the Court to grant the requested writ, and there are none. As the Petition itself makes clear, this involves an individual's claim that the courts below made erroneous factual findings, a situation in which a writ is "rarely granted." Sup. Ct. R. 10. He cites no legal authority. This fact-specific case is utterly meritless, and it has no precedential value whatsoever and no significance beyond the interests of two private parties. The writ should be denied.

Application of the illustrative criteria in Supreme Court Rule 10 further supports denial of the writ.

First, Petitioner makes no claim that there exists a split of authority among the United States courts of appeals as to any issue which he has raised; or that the courts below decided a federal question in a way that conflicts with any state court decision; or that any lower court has so far departed from the accepted and usual course of judicial proceedings as to call for this Court's exercise of supervisory power. Sup. Ct. R. 10(a).

Next, Petitioner does not assert that this involves a decision by a state court of last resort with respect to an important federal question. Sup. Ct. R. 10(b).

Finally, Petitioner has not averred that any court, state or federal, has decided an important but unsettled question of federal law, or has decided a federal question in a way that conflicts with this Court's relevant decisions. Sup. Ct. R. 10(c).

## CONCLUSION

For all the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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